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No. 85-1205

# IN THE SUPREME COURT OF THE UNITED STATES

October Term 1986

**JEROME B. ROSENTHAL, et al.,**

*Petitioners,*

*vs.*

**DORIS DAY, etc., et al.,**

*Respondents.*

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PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
FOR THE SECOND APPELLATE DISTRICT

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## PETITIONER'S REPLY MEMORANDUM

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Day argues in her opposing brief that this Court has no jurisdiction to hear this case because no federal claim was raised below (Brief in Opposition, pp. 2-3).

However, this Court has held that "[n]o particular form of words and phrases is essential" for this purpose. *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928);

*Street v. New York*, 394 U.S. 576, 584 (1969). Here, though the Fourteenth Amendment was not explicitly relied upon below, the pleadings used the key words generally associated with Fourteenth Amendment concerns. Thus, the denial of a jury trial was denounced as "arbitrary" (AOB 59), a word and concept which has been connected with the guarantee of equal protection of the laws through most of its long history (see *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)), while the other errors set out in the petition were a number of times denounced as denials of "fundamental fairness" and of a "fair trial", phrases traditionally used to invoke the due process clause. See, *e.g.*, *Estelle v. Williams*, 425 U.S. 501, 503 (1976).

In any case, as Day has pointed out (Brief in Opposition, p. 3, footnote 2) this Court has in the past exercised its authority to hear and decide cases in which the federal issue had not been raised in the state courts below. In *Vachon v. New Hampshire* 414 U.S. 478 (1974), the Court decided to consider a constitutional issue it found after an independent review of the record, even though it had neither been presented to the courts below in its constitutional form, nor noted in the appellant's jurisdiction statement. 414 U.S. 478, 480, 481 (Rehnquist, J. dissenting).

Just as this Court in *Vachon* was unwilling to let stand a criminal conviction which had no evidence to support it, in spite of the fact that the issue had not been raised in the language of the Constitution in the New Hampshire court, 414 U.S. 478, 479-80, so here the Court should not allow the absence of specific cites to the Constitution below stop it from striking down a civil judgment entered against a party who had no fair opportunity to present his case, and was in addition denied the generally available right to a jury trial.

Day further asserts that the issues stated in the Petition are "of insufficient importance to warrant the issuance of a Writ of Certiorari (Brief in Opposition, p. 5)." The assertedly unimportant issue, as stated by Day, is "whether 'the denial of the right to be heard' and 'arbitrary' conduct by a state court constitutes a violation of a civil litigant's rights under the Fourteenth Amendment (Brief in Opposition, p. 5)." Day's further comment on this question is that

> This is hardly a burning issue in Constitutional litigation. All courts (state and federal) agree that civil litigants have the right to be heard, and that arbitrary conduct is improper.
>
> Brief in Opposition, p. 5.

A number of points need to be made about this extraordinary remark. First, it concedes one of Rosenthal's central contentions: that the Fourteenth Amendement is violated where a civil litigant is effectively denied a hearing, or when he is arbitrarily denied a state guaranteed right to jury trial.

Secondly, this concession is not, as Day suggests, an insignificant one: it is of fundamental doctrinal importance. Day would have us believe that because we all know that unfairness and arbitrariness are wrong, they are so obviously in violation of the Fourteenth Amendement that there is no point in spending the time to denounce them. This is clearly not so. It is one thing to know that a course of conduct is wrong, and another to know that it violates the Constitution of the United States. Thus, this Court has in the past thought it worth while to make it clear that the due process clause requires a process free of brutality, *Rochin v. California*, 342 U.S. 165, 173 and "an impartial and disinterested tribunal" on civil as well as criminal cases,

*Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980), even though both of these might appear to Day to be the merest truisms. In fact, a declaration that conduct such as that engaged in by the trial court here is a violation of the Fourteenth Amendment would establish a precedent of fundamental importance for all of those interested in civil litigation.

Day further develops her point, saying that a decision from this Court on this matter will have "no precedential significance" because

> Courts will continue to eschew conduct which they believe to be arbitrary and the question of whether conduct is arbitrary will, as always, depend upon the facts of a particular case.
>
> Brief in Opposition, p. 5.

This comment ignores entirely the historic function of this Court in gradually filling in the content of the generalities of the Constitution on a case-by-case basis. The fact that judges in general do attempt to adhere to the "vague contours" of such concepts as due process and fundamental fairness, *Rochin v. California, supra*, 342 U.S. 165 at 170, and that those concepts can never be ultimately fixed with any degree of certainty, is no reason for this Court not to continue the process of developing their meaning and giving guidance as to their application.

The character and significance of this process was made clear for this Court by Justice Frankfurter in *Rochin*. He there made the point, quoting *Malinski v. New York*, 324 U.S. 401, 416-17 (1945), that

> Regard for the requirements of the Due Process Clause "inescapably imposes upon this court an exercise of judgment upon the whole course of the proceedings . . . in order to ascertain whether they

> offend those canons of decency and fairness which express the notions of justice of English-speaking peoples . . . .
>
> 342 U.S. 165, 169.

This exercise of judgment involves an examination of the circumstances of the particular case in the light of fundamental due process values in which the content of due process is never fixed, but gradually elucidated in "the process of judgment." 342 U.S. at 170.

The *Rochin* court was not deterred from using this due process methodology by the fact that application of the principles to which it gives rise would "depend upon the facts of a particular case (Brief in Opposition, p.5)." It explicitly recognized that "hypothetical situations can be conjured up, shading imperceptibly from the circumstances of this case and by gradations producing practical differences . . .", 342 U.S. at 174, but did not regard that as a reason to refrain from decision. So too, in *Lisenba v. California*, 314 U.S. 219 at 236 (1941), this Court held that the adoption by a state of an evidentiary rule constitutional on its face could not

> "foreclose inquiry as to whether , in a given case, the application of that rule works a deprivation of . . . life liberty or property without due process of law."

Thus, a decison by this Court in the instant case would have great precedential value. First, it would establish authoritatively that an accumulation of error in a civil case may amount to the denial of a hearing and therefore a violation of due process, and that arbitrary denial of a civil jury trial is a denial of equal protection of the laws. Secondly, it would begin the process, necessarily gradual and case-by-case, of filling in the content of these broad

conceptions through an investigation of the facts in the instant case. Indeed, a consideration of potential precedential value, far from supporting an argument against granting the writ here, adds force to the contention that review should be granted.

Respectfully submitted,

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